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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Hon. Reed E. Hundt
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

Re: CMRS Competitive Safeguards
WT Docket No. 96-162
Customer Proprietary Network Information
CC Docket No. 96-115
Written Ex Parte Presentation

Dear Chairman Hundt:

I am writing in response to a series of *ex parte* presentations made to the Commission recently by Pacific Telesis and its affiliates (collectively, "Pacific") regarding customer proprietary network information, or CPNI.[1/] In those presentations, Pacific asserted the astounding and unfounded proposition that the Commission should permit local exchange carriers to obtain authorization to use CPNI and release it to their affiliates via "negative option" notification procedures. For the reasons described below, Cox Enterprises submits that there is no basis for such an action either under new Section 222 of the Communications Act or in the public interest. Furthermore, the actions of Pacific and other incumbent local exchange carriers suggest that the Commission should begin an active investigation of their treatment of CPNI.

Under the negative option approach proposed by Pacific, the customer's CPNI would be available to the carrier unless the customer tells the carrier not to use it. Pacific argues that this procedure is consistent with Section 222. This simply is not the case. If negative option notification were permitted, then there would have been no reason for

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1/ *See* Letters of Gina Harrison, Director, Federal Regulatory Relations, Pacific Telesis, to William F. Caton, Acting Secretary, Federal Communications Commission, December 5, 10, 11, 1996.

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Section 222, because the Commission's pre-existing CPNI rules adopted a negative option for the vast majority of telephone customers. Instead of a negative option, Section 222 creates a general requirement for *affirmative, written* consent by consumers, with precisely limited exceptions to that principle.[2/] None of the exceptions permits a negative option and even the exception for inbound telemarketing (*i.e.*, when the customer calls the carrier) requires affirmative oral consent for use of CPNI.[3/] Section 222 also specifically describes the two circumstances when a carrier may use CPNI internally without permission: When providing a telecommunications service (*e.g.*, using signaling information to route a call) and when providing other services necessary to the underlying telecommunications service (*e.g*, directory assistance). In other words, nothing in Section 222 permits a carrier to use CPNI to promote or market other services without affirmative consent from the customer. No other reading of the statute is possible, let alone reasonable.[4/]

Even if the statute did permit the kind of negative option that Pacific proposes, it has not demonstrated that a negative option is in the public interest. Carriers do not need individual CPNI to develop new services. (While they may need aggregate CPNI, Section 222 does not restrict the use of aggregated information.) Moreover, Pacific's survey on privacy issues does not show that consumers expect or accept the use of CPNI. Indeed, the pollers made no attempt to explain what CPNI is, beyond the vague statement that a telephone company might "look at its customer records." Without specific information about how a carrier might use CPNI, it is impossible to conclude that consumers won't mind if telephone companies use it. In that context, all the poll establishes is that consumers are interested in hearing about new services, which is an entirely unremarkable proposition. In fact, there is a very deep concern among Americans about the commercial use of their personal information. A 1994 Harris survey found that an astonishing eighty-two percent of Americans are deeply concerned about threats to their personal privacy. Seventy-eight percent believe that they have lost control over how their personal information is used by

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2/ *See* 47 U.S.C. § 222(c)(2) (written consent requirement), (d) (exceptions).

3/ *See* 47 U.S.C. § 222(d)(3) (use of CPNI during inbound telemarketing permissible "if such call was initiated by the customer and the customer approves of the use of such information").

4/ Pacific argues that it must be allowed to share CPNI between its local telephone and PCS subsidiaries because it is permitted to joint market CMRS and local telephone service. That is a non sequitur. There are many ways to joint market services without using CPNI. In any event, the statute doesn't prevent Pacific from using CPNI for joint marketing, so long as Pacific actually obtains consent to use that CPNI from its customers.

businesses and seventy percent have refused to give information to businesses because it was too personal.[5/]

Indeed, there are strong reasons to believe that negative options of any sort are not in the public interest. For instance, the FTC greatly restricts the use of negative options by book, record and video clubs, and gives consumers an opportunity to return unwanted merchandise that is sent by companies that do not comply exactly with the rules. Similarly, cable operators are prohibited from using negative option billing for new services under Section 623(f) of the Communications Act. Negative options are disfavored because Congress and regulators have recognized that consumers often fail to realize they have a choice to make, even when making that choice is in their interest.[6/] Consequently, there should be a heavy presumption against negative options, wherever they occur. Pacific has not provided any evidence to overcome that presumption.

Finally, recent events, including Pacific's *ex parte* filings, suggest that the Commission should undertake a comprehensive investigation of the CPNI practices of local telephone companies. In addition to Pacific's insistence on retaining negative option CPNI notification, Cox is aware of incidents in which at least one Bell company has sought to obtain permission to use CPNI in an outbound telemarketing call. In the recent past, Bell companies also have sought to obtain access to CPNI by making misleading claims, such as that failing to provide access would force a business to switch to a different account team. For that matter, Pacific's proposed notification suggests that access to CPNI is needed to develop new services, which is incorrect. In light of these facts, and the aggressive posture taken by Pacific and other telephone companies in this proceeding, it would be appropriate for the Commission to investigate incumbent LEC CPNI practices. The Commission also should involve consumers in this process so that they may provide their own perspective on the practices of telephone companies seeking access to CPNI and on the effects of widespread disclosure of CPNI on privacy interests.

5/ Louis Harris and Associates, Inc., *Interactive Services, Consumers and Privacy* (Conducted for *Privacy and American Business*) (1994).

6/ The Commission confronted a similar phenomenon in equal access balloting. Despite massive marketing campaigns by long distance carriers, a very high percentage of consumers never return their equal access ballots.

In accordance with the requirements Section 1.1206(a) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office.

Respectfully submitted,

Alexander V. Netchvolodoff

cc: Hon. James H. Quello
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